

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
ENTERED

SEP 06 2004

Michael N. Milby, Clerk of Court

DORCAS B. WILSON,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner, Social
Security Administration

Defendant.

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CIVIL ACTION NO. H-04-1765

MEMORANDUM AND RECOMMENDATION

Plaintiff Dorcas B. Wilson filed this action¹ pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3) for judicial review of an unfavorable decision by the Commissioner of the Social Security Administration of Wilson's claim for disability insurance benefits under Title XVI of the Social Security Act ("Act").

Pending before the court are motions for summary judgment filed by each party. Having reviewed the motions, the submissions of the parties, the pleadings, the administrative record, and the applicable law, the court recommends that the Plaintiff's Motion for Summary Judgment (Docket Entry No. 7) be DENIED, the Commissioner's Motion for Summary Judgment (Docket Entry No. 10) be GRANTED, and that the administrative law judge's decision denying benefits be AFFIRMED.

¹This case was referred to this magistrate judge pursuant to 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72. Docket Entry No. 9.

I. BACKGROUND

A. Procedural History

Wilson filed an application for Supplemental Security Income (“SSI”) benefits with the Social Security Administration (“SSA”) on September 12, 2000. (Tr. 48-52).² Wilson alleges she is disabled and has been unable to work since September 2, 2000, due to problems with her intestines, diabetes, obesity, and chest pains. (Tr. 54, 59). After Wilson’s application was denied at the initial and reconsideration levels (Tr. 25-38), Wilson requested a hearing before an administrative law judge (“ALJ”), which was held on November 27, 2001. (Tr. 300-09).

In a decision dated February 2, 2002, the ALJ denied Wilson’s application for SSI benefits, finding that Wilson was not disabled as defined by the Act. (Tr. 11-20). The Appeals Council of the SSA’s Office of Hearings and Appeal approved the ALJ’s decision, thereby transforming it into the final decision of the Commissioner. (Tr. 4-6). *See Sims v. Apfel*, 530 U.S. 103, 107 (2000).

On April 29, 2004, Wilson filed a complaint pursuant to 42 U.S.C. §§ 405(g) and 1383(C)(3), seeking judicial review of the ALJ’s decision. (Docket Entry No. 2).

B. Factual History

Wilson was forty-three years of age at the time of the hearing. (Tr. 14). She has a tenth grade education. (Tr. 14). Wilson’s past relevant work experience includes employment as a convenience store clerk. (Tr. 14, 307).

Medical records reflect that she has been diagnosed with diabetes mellitus, chronic obstructive pulmonary disease, and obesity. (Tr. 132, 140-45, 171). Most relevant to the motions before the court, the medical records also indicate that Wilson has had problems with her intestines and bowels,

²The transcript of the administrative record will be cited as “Tr. ___”.

for which she has had multiple abdominal surgeries. (Tr. 142-43). Wilson was admitted for treatment several times between August 2000 and December 2000 for abdominal pain. (Tr. 142, 171, 206).

On August 6, 2000, Wilson was admitted to San Jacinto Methodist Hospital with possible small bowel obstruction. (Tr. 142). She was diagnosed as having an abdominal hernia, and possible ileus. (Tr. 140-41, 145, 153). A computer tomography ("CT") scan revealed a suprapubic hernia consisting of small bowel contents, and diffuse fatty infiltration of the liver. (Tr. 142). Radiological reports revealed multiple dilated loops of the small bowel, but no evidence of obstruction. (Tr. 142-53). Wilson was discharged a few days later on August 9, 2000. (Tr. 142).

Wilson was admitted September 1, 2000, to Cleveland Regional Medical Center, again with complaints of abdominal pain. (Tr. 171). A CT scan showed a large anterior abdominal wall hernia with protruding small bowel within it. (Tr. 171, 267). Other CT scans indicated an incarcerated ventral hernia, and small bowel obstruction. (Tr. 179, 192). Dr. Glenn Lytle performed surgery to repair the incarcerated ventral hernia on September 1, 2000. (Tr. 180). Wilson was discharged September 5, 2000. (Tr. 171).

Wilson was admitted to Cleveland Regional Medical Center again on November 30, 2000, with acute abdominal pain, nausea, and vomiting. (Tr. 206). An x-ray was taken, suggesting an obstruction in the small bowel. (Tr. 206). Dr. Lytle opined that Wilson either had a gastric outlet obstruction or a proximal small bowel obstruction. (Tr. 206, 209). After several tests were performed, no obstructive point was identified, although mildly dilated loops of the small bowel were present. (Tr. 206, 224). Wilson was discharged on December 6, 2000. (Tr. 206).

A radiology report from February 2001 showed several small bowel loops present, suggesting mild adynamic ileus. (Tr. 133). Medical records from the University of Texas Medical Branch

Hospitals dated February 25, 2001, show that Wilson experienced a four to five day episode of abdominal pain accompanied by vomiting and diarrhea. (Tr. 84).

In a Medical Questionnaire dated November 16, 2001, Dr. Philip Wisiackas indicated that Wilson was suffering from a stomach disorder of unknown etiology and continuous pain that would require bed rest everyday. (Tr. 294-98). Dr. Wisiackas also described Wilson's functional capacity as limited to standing twenty minutes at a time, for no longer than four hours in a given eight hour period, and limited to walking two hundred feet without rest or severe pain. (Tr. 294-98).

Wilson did not attend the administrative hearing held on November 27, 2001, but was represented by her attorney. (Tr. 300-02). At the hearing, the ALJ heard testimony from Dr. Steven Goldstein, a medical expert, and Hermon Lett, a vocational expert. (Tr. 300-09).

Based on his review of the medical evidence, Dr. Goldstein testified that Wilson suffered from asthma, chronic bronchitis, and pulmonary problems. (Tr. 303-04). Dr. Goldstein also described Wilson as having an acute or episodic problem, rather than chronic, with gastroenteritis and bowel obstruction. (Tr. 305-06). When asked whether any of these impairments, individually or in combination, met or equaled a medical listing, Dr. Goldstein responded no. (Tr. 303-04). Dr. Goldstein also opined that Wilson had the physical capacity for a sedentary level of work, with the restriction of a climate-controlled environment to avoid dust and fumes. (Tr. 304-05).

Vocational expert Lett, classified Wilson's prior grocery or convenience store clerk work as medium exertional level, and semi-skilled. (Tr. 307-08). Lett was not posed the question whether Wilson could perform her past relevant work, but the ALJ based his findings on the assumption that she could not. (Tr. 20). Lett identified other jobs that Wilson could perform at the sedentary level where she could be in a climate-controlled environment to avoid dust and fumes: namely, cashiering

jobs. (Tr. 307-08). Lett testified that these jobs are prevalent throughout the national economy. (Tr. 308).

After reviewing the evidence, the ALJ determined that Wilson was not disabled within the meaning of the SSA, using the five-step analysis specified in 20 C.F.R. § 416.920(a) (2004). (Tr. 14, 19-20). At step one, the ALJ found Wilson had not engaged in substantial gainful activity since September 2, 2000, the alleged onset of disability. (Tr. 19). At step two, the ALJ found her to have severe impairments; in particular, diabetes mellitus, chronic obstructive pulmonary disease, and obesity, but held that these impairments did not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4, as is required at step three to be presumed disabled. (Tr. 19). At the fourth step, the ALJ found Wilson's impairment rendered her unable to perform her past relevant work, but held at step five that she retained the residual functional capacity to perform sedentary work, limited to climate-controlled environments to avoid dust and fumes. (Tr. 20). Additionally at step five, the ALJ found that Wilson had acquired readily transferable cashiering skills applicable to a significant number of jobs in the national economy which she could perform. (Tr. 20).

II. APPLICABLE LAW

A. Standard of Review

In Social Security disability cases, 42 U.S.C. § 405(g) (2004) governs the standard of review. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002). The federal courts review the Commissioner's denial of Social Security benefits to ascertain whether (1) the final decision is supported by substantial evidence, and (2) whether the Commissioner used the proper legal standards to evaluate the evidence. *Masterson v. Barnhart*, 309 F.3d 267, 272 (5th Cir. 2002).

“Substantial evidence” means that the evidence must be enough to allow a reasonable mind to support the Commissioner’s decision; it must be more than a mere scintilla and less than a preponderance. *See Brown v. Apfel*, 192 F.3d 492, 496 (5th Cir. 1999) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In applying this standard on review, the court “scrutinize[s] the record to determine whether such evidence is present.” *Myers v. Apfel*, 238 F.3d 617, 619 (5th Cir. 2001). If the Commissioner’s findings are supported by substantial evidence, they must be affirmed. *Newton v. Apfel*, 209 F.3d 448, 452 (5th Cir. 2000). The court does not reweigh the evidence, try the issues *de novo*, or substitute its judgment for that of the Commissioner. *Myers*, 238 F.3d at 619. “Conflicts in the evidence are for the Commissioner and not the courts to resolve.” *Masterson*, 309 F.3d at 272. The courts strive for judicial review that is deferential but not so obsequious as to be meaningless. *Brown*, 192 F.3d at 496.

To determine whether the decision to deny a claim for disability benefits is supported by substantial evidence, the court examines the following evidence: (1) objective medical facts; (2) diagnoses and opinions from treating and examining physicians; (3) the claimant’s subjective evidence of pain and disability; and (4) the claimant’s age, education, and work history. *Martinez v. Chater*, 64 F.3d 172, 174 (5th Cir. 1995).

B. Standard for Determining Disability under the Act

The Act authorizes payment of disability insurance benefits and supplemental security income to individuals with disabilities. *Barnhart v. Walton*, 535 U.S. 212, 214 (2002). “Disability” is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be

expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A) (2004). The burden is on the claimant to prove he or she has such a disability. *Masterson*, 309 F.3d at 271.

A physical or mental impairment is defined as “an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.” 42 U.S.C. § 423(d)(3) (2004). The mere presence of an impairment, however, does not necessarily establish a disability. *Anthony v. Sullivan*, 954 F.2d 289, 293 (5th Cir. 1992). A claimant is disabled only if she is incapable of engaging in any “substantial gainful activity,” which is defined as “work activity involving significant physical or mental abilities for pay or profit.” *Newton*, 209 F.3d at 452-53.

To determine whether the claimant is, in fact, disabled, the ALJ follows a five-step analysis outlined in 20 C.F.R. § 416.920(a) (2004). First, the claimant must not be presently engaged in substantial gainful activity. Second, a claimant must have an impairment or combination of impairments which significantly limits her physical or mental ability to do basic work activities. Third, to secure a finding of disability without consideration of age, education, and work experience, a claimant must establish that her impairment meets or equals an impairment in the appendix to the regulations. If so, she is presumed disabled and is entitled to benefits without further inquiry. Fourth, a claimant must establish that her impairment prevents her from doing past relevant work. Fifth, the impairment must prevent her from doing any other work. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002).

The claimant bears the burden of proof under the first four steps. If the claimant successfully carries that burden, the burden shifts to the Commissioner in step five to show that other substantial

gainful employment is available in the national economy, which the claimant is capable of performing. If the Commissioner successfully makes that showing, the burden shifts back to the claimant to prove that she cannot perform the alternative work suggested. A finding that a claimant is disabled or is not disabled at any point in the five-step review is conclusive and terminates the analysis. *Masterson*, 309 F.3d at 272.

III. ANALYSIS

Wilson mounts essentially two challenges to the ALJ's decision: (a) that her medical impairment should have been found equivalent to one of the listed impairments, entitling her to a presumption of disability; and (b) that one of her major medical conditions was not considered in determining her functional capacity. These claims are without merit, as discussed below.

A. The Listing of Impairments Claim (Step 3)

Wilson maintains that the ALJ erred at step three, claiming that her abdominal condition meets the criteria of Listing 5.07 C. *See* 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 5.07 C (2004). Listing 5.07 places "regional enteritis"³ among the listed impairments that, if demonstrated, would entitle a claimant to be found disabled. *See* 20 C.F.R. § 416.920(a)(4)(iii) (2004). Subpart C of Listing 5.07 requires that regional enteritis be accompanied with "[i]ntermittent obstruction due to intractable abscess or fistula formation."

³"Regional enteritis" is defined as "[e]nteritis of unknown cause that is usually limited to the terminal ileum but can progress to other segments of the intestine, characterized by nodule formation and fibrous tissue buildup, abdominal pain, and patchy deep ulceration." *The American Heritage Stedman's Medical Dictionary* (2002) at 711. "Enteritis" is "[i]nflammation of the intestinal tract, especially the small intestine." *Id.* at 268.

According to Wilson, a radiology exam performed on August 6, 2000 substantiates that she has regional enteritis. A review of the radiological report, however, does not support this assertion. Instead, the report notes an abnormal small bowel gas pattern, gaseous distention of the stomach, and states that the findings are consistent with at least partial if not a higher degree of small bowel obstruction. (Tr. 150). The report does not state that Wilson was suffering regional enteritis or otherwise experiencing inflammation of the intestinal tract. (Tr. 150). Further examinations performed in the days following also do not diagnose regional enteritis. Nor do they even show evidence of obstruction of the small bowel. (Tr. 151-54). The examinations merely reflect that Wilson had a midline hernia in the “supraumbilical” and “suprapubic” area. (Tr. 152-54).

Wilson further argues that hernias share similar characteristics as abscesses and fistulas, and, in her case, produce a similar result--an obstruction of the intestines. Wilson’s argument is unavailing. Listing 5.07 C requires that regional enteritis be “demonstrated by operative findings, barium studies, biopsy, or endoscopy.” 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 5.07 C (2004). Wilson cites no record evidence that she has ever been diagnosed with regional enteritis or that such a condition has ever been demonstrated by operative findings (i.e., barium studies, biopsy, or endoscopy). Moreover, the listings require that complications of the digestive system “must be shown to persist on repeated examinations despite therapy for a reasonable presumption to be made that a marked impairment will last for a continuous period of at least 12 months.” 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 5.00 A (2004). Wilson fails to point to a single diagnosis of regional enteritis, much less demonstrate that it persisted over the course of repeated examinations.

B. The Residual Functional Capacity Claim (Step 5)

Wilson also maintains the ALJ erred at step five of the evaluation process in determining her residual functional capacity (“RFC”). She argues the ALJ failed to consider her gastrointestinal disorder; namely, that her bowel obstruction is chronic and severe, and remains unresolved. Wilson also posits that she is still suffering from a hernia.

In his analysis of Wilson’s allegations of stomach pain, the ALJ stated:

[t]he medical record documents that the claimant has undergone several hernia repairs, and has been diagnosed as having gastroenteritis and small bowel obstruction. Dr. Goldstein testified, however, that these impairments were acute, rather than chronic in nature. He noted that when admitted on February 6, 2000, the claimant indicated that she had been experiencing abdominal pain for 1 day. Likewise, the doctor noted that when admitted to the hospital on November 30, 2000, the claimant was noted to have abdominal pain and nausea of a 1-day duration. (R. 18). (citations omitted).

Wilson faults the ALJ’s reliance on Dr. Goldstein’s characterization of her symptoms as acute rather than chronic. Wilson argues that this characterization was based on Dr. Goldstein’s assumption that her bowel obstruction was due in part to her hernia, and that the hernia had been repaired. (Tr. 306). Wilson contends that the hernia that was repaired was a supra-umbilical hernia, but that she still has a suprapubic hernia affecting her functional capacity, which Dr. Goldstein and the ALJ failed to take into account.

The Commissioner counters that Wilson has not identified any evidence of a gastrointestinal condition that prevented her from performing at the limited sedentary level as determined by the ALJ. Wilson’s treatment records document three acute episodes that resolved quickly after appropriate medical treatment, and thus, according to the Commissioner, cannot be considered disabling. *See*

Johnson v. Bowen, 864 F.2d 340, 348 (5th Cir. 1988) (explaining that an impairment amenable to treatment is not disabling).

Substantial evidence supports the ALJ's determination that Wilson can perform sedentary work within a climate-control environment. In evaluating the effect of Wilson's gastrointestinal disorder on her RFC, the ALJ cited Dr. Goldstein's testimony that this impairment was acute in nature, rather than chronic. (Tr. 18). The medical records compiled by Wilson's treating and examining physicians provide substantial evidence for this conclusion. Wilson spent August 6-9, 2000, in the hospital with abdominal pain and vomiting, and was then discharged in stable condition. (Tr. 142-43). On September 1, 2000, Wilson suffered another round of abdominal pain, and was again admitted for medical treatment. (Tr. 171). She underwent surgery to repair a ventral hernia, and was discharged four days later, on September 5, 2000. (Tr. 171). On November 30, 2000, Wilson was admitted to treatment with acute abdominal pain, nausea, and vomiting, and was discharged after conservative treatment on December 6, 2000. (Tr. 206). Some of Wilson's 2001 treatment notes refer to "stomach pain" and a "ventral hernia," but do not identify any resulting functional limitations. (Tr. 290). Wilson's abdominal problems thus appear to be episodic and acute in nature, rather than chronic, and so would allow her to perform work at a limited sedentary level. Additionally, it should be noted Dr. Goldstein was cross-examined by Wilson's counsel on this very issue. (Tr. 305-06). The issue of a second unresolved hernia was not raised at the hearing before the ALJ. Consequently, there is substantial evidence supporting the ALJ's finding.

Assuming that Wilson has an unresolved gastrointestinal impairment, such an impairment by itself does not necessarily establish a disability. *See Anthony*, 954 F.2d at 293. A claimant is disabled only if she is incapable of engaging in any substantial gainful activity. *Id.* The relevant issue at step

five in the evaluation is the claimant's functional capacity in light of her impairment. *See* 20 C.F.R. § 416.920(a)(4)(v) (2004). The ALJ found Wilson has the RFC to engage in sedentary work limited to a climate-controlled environment. (Tr. 18). The only contrary evidence in the record is a more limited assessment of her functional capacity in a Medical Questionnaire prepared by Dr. Wisiackas. (Tr. 294-98). Dr. Wisiackas opined that Wilson was suffering continuous pain that would require bed rest everyday. (Tr. 294-98). The ALJ, however, properly rejected Dr. Wisiackas's assessment as it was unsupported by any objective clinical findings. (Tr. 16-17). *See Leggett v. Chater*, 67 F.3d 558, 566 (5th Cir. 1995). Wilson does not contend this rejection was in error or that the ALJ failed to give Dr. Wisiackas's assessment proper weight in determining her RFC. Indeed, Wilson offers no other evidence that her gastrointestinal disorder prevents her from working at the level found by the ALJ.


IV. CONCLUSION

For these reasons, the court RECOMMENDS that Plaintiff's Motion for Summary Judgment be DENIED, that Defendant's Motion for Summary Judgment be GRANTED, and that the Commissioner's decision denying benefits be AFFIRMED.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties. The parties have ten (10) days from receipt to file written objections to the Memorandum and Recommendation. *See* FED. R. CIV. P. 72. Absent plain error, the failure to file written objections bars an attack on the factual findings, as well as the legal conclusions, on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208. Copies of the objections must be mailed to the opposing party and to the chambers of the magistrate judge, 515 Rusk, Suite 7727, Houston, Texas 77002.

Signed on September 3rd, 2004, at Houston, Texas.



Stephen Wm. Smith
United States Magistrate Judge